United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1661

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P/S.

In The

United States Court of Appeals

For The Second Circuit

FABRIZIO & MARTIN INCORPORATED,
Plaintiff-Appellee-Appellant,

vs.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,
Defendants,

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE,
Defendants-Appellants-Appellees,

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,
Defendant-Appellee-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District

BRIEF FOR FABRIZIO & MARTIN INCORPORATED

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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FABRIZIO & MARTIN, INCORPORATED,

Plaintiff-Appellee-Appellant

DOCKET NO. 741661

-v-

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC. and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendants-Appellants-Appellees,

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE AND POUND RIDGE,

Defendant -Appellant -Appellee ,

AETNA CASUALTY AND SURETY CO.,

Additional Defendant on the Counterclaim of the defendant, The Board of Education Appellee-Appellant

On appeal from a Judgment of the United States District Court for the Southern District.

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PLAINTIFF FABRIZIO & MARTIN BRIEF

I. ISSUES PRESENTED

1. To what extent may an innocent contractor who relied on assurances of a Board of Education, its architect and its attorney that a contract was legal and in accordance with the law of the State of New York, be penalized for so relying when it is later determined that the assurances were given erroneously?

2. Where a Board of Education, its attorney and architect unilaterally alter a proposal so as to be in non-compliance with the State's competitive bid statute, while representing to a contractor that the procedure was legal and proper, should they, or the contractor, be liagle for damages, if any, to taxpayers which result therefrom?

3. Is a Board of Education, after accepting substantial, but not full performance by a contractor stopped from asserting the illegality of the contract which it caused, although assuring the contractor through its attorney and architect that the contract was proper, for the purpose of avoiding payment for work done by the contractor and materials supplied by it?

4. In such circumstances may the contractor still recover the reasonable value to the public of work and material supplied and retained?

5. May the Board in such circumstances relet the contract to others, notwithstanding the assurance of the contractor and its surety that the contractor was ready, willing and able to complete performance, and then charge the contractor with the cost of completion?

6. Is a contractor entitled to rely on the regularity of public acts of public officials performed within the scope of their authority and certified correct by attorneys for such public officials and their architect?

7. May the Board, without resort to legal process, simply retain property of the contractor left on the job site in the circumstances described above?

II. STATEMENT OF THE CASE

The Plaintiff commenced this action to recover $708,526.15 it claims is due from the Defendant School Board in respect of work, labor, services and materials furnished by Plaintiff in the construction of the Bedford Middle School in the town of Bedford, Westchester County, New York. The Defendant, the Board of Education of Central School District #2, counterclaims for $451,796 constituting the value of services contracted for and not received, excess cost required by it in hiring another contractor to finish the construction of the school, and the costs of bonds needed to finance additional construction and interest thereon. The Defendant Aetna Casualty and Surety Co. ("Aetna"), on the grounds that a fraud was perpetrated on it, counter-claims for payments made on a performance bond and for legal costs incurred in defending against this action and other claims as well as legal fees and costs in the instant case and on claims made on the payment bond.

Three prior decisions directly effect the determination of the issues involved. On February 21, 1967 the District Court held that the contract between the Board and Fabrizio was void and unenforceable because it had been made in violation of the requirements of the competitive bidding statute, Section 103 New York General Municipal law.

On October 2, 1968 the District Court granted Defendant's Motion to Strike Plaintiff's Complaint but denied its Motion for Summary Judgment on its Counter-Claim.

In the present action, Fabrizio replying to the board's counter-claim asserts five affirmative defenses and a set-off alleging that the board is indebted to Fabrizio in the amount of $708,526.15 after all appropriate credits have been given. In effect, Fabrizio claims that the board has been unjustly enriched to that extent, or would be, if it can succeed in asserting the illegality of the contract which it procured or fraudulently induced to justify the retention of that sum.

III. FACTS

The basic facts are not in dispute. In November, 1963, the Defendant ("Board") invited bids for the construction of the Bedford Middle School. Plaintiff, Fabrizio and Martin ("Fabrizio"), entered a bid for general construction and site work. The bids were opened on January 7, 1964. On January 9th Fabrizio advised the Board that it had mis-calculated by $171,000 and requested permission either to withdraw its bid or rebid. The Board accepted a lower bidder's withdrawal and met with Fabrizio on February 10, 1964. There the miscalculation was discussed and the Board accepted Fabrizio's contention that it had erroneously underbid by $171,000.

The next highest bidder after Fabrizio was W.A. Stanley whose base bid was $222,100 in excess of the Fabrizio bid (appendix-82a). Thus, by accepting the Fabrizio bid, even eith the $171,000 added the Board was getting the benefit of the lowest bid by $51,100.

Fabrizio could legally have withdrawn its bid at the time it sought to do so, Moffett H. & C. Co. v. Rochester, 178 US 373, but agreed to abide by the Board's suggestion as to how to proceed. (86a). The Board suggested that Fabrizio eliminate agreed upon items of work totalling $171,000 so that the contract could be awarded to Fabrizio at the original bid of $2,326,000.

The Board, its counsel and the architect approved this course of action and implemented its effectuation. A contract was signed on March 17, 1964 between Fabrizio and the Board for construction of the school pursuant to the original plans and specifications and at figures set out in the bid as originally submitted by Fabrizio. On the same day a change order was prepared providing for the elimination of certain items called for in the plans and specifications. No price evaluation was made as to these changes.

The Board's architect and attorney each testified that the other bad prepared the "change order" (89a). A letter dated March 10, 1964 from the architect to the attorney indicating which items were to be included in the change order was ordered removed from the files of the school district. (89a). The effect of this change order was to permit Fabrizio to have a savings on the costs of construction of $171,000; that is, it was allowed to cut out $171,000 of work called for in the plans and specifications, without a reduction of $171,000 from the bid submitted. The contract and change order were ratified by the Board of March 25, 1964.

Construction began and disputes arose from almost the outset. The Board was slow in paying the monthly requisition which the contract called for. It delayed executing change orders with promptness and failed to make payments for work completed as prescribed and refused to allow extensions when extra work was required. Differences between the parties continued to magnify, and on March 2, 1966 Fabrizio advised the Board that it was terminating the contract. On April 5, 1966 the Board, Fabrizio and Aetna met to seek to determine whether their differences could be ironed out. Aetna proposed a solution and Fabrizio agreed that if that solution was acceptable, it would complete construction by July, 1966. The Board, however, decided to secure another contractor to complete construction and awarded the contract to complete construction to Mars-Normel.

The above recitation of facts, except for minor grammatical changes, appeared at pages 1055a-1059a of the decision below by Judge Carter. Since the Board does not claim that any facts were found erroneously it must be assumed that the finding below is the basis upon which the determination must be made in this appeal.

POINT I

The innocent contractor ought not to be penalized in the name of equity.

The issue before the Court is novel to the extent that the contractor is a genuinely and totally innocent victim of the machinations of the Board. Whether those machinations were deliberate or inadvertent, is tangential to the point.

The fact remains that neither ruling in Jarred Contr. Corp. v. New York City T.R. Auth. 22 N.Y. 2nd 187; 292 N.Y.S. 2nd 98 nor Gerzof v. Sweeney 22 New York 2nd 297; 292 N.Y.S. 2nd 640 upon which the Defendant Board chiefly relies, is applicable to the present case.

Although a superficial reading of portions of the decisions is those cases might appear to have some relevance, the facts underlying each case are clearly distinguishable from the present case.

In Jarred the Plaintiff's action was for work done after the Defendant cancelled the contract in question. An officer of the Plaintiff refused to waive immunity before a grand jury, which the law specifically provided as a ground for termination, and its attorney refused to let Plaintiff's witnesses testify as to how to bid was arrived at. The decision in Jarred recites that both the Plaintiff and its officers were indicted for first degree perjury with regard to the submission of false non-collusive bidding statements concerning the contract in question. That language arising in that context could be applied to the present case tells a good deal more about the position of the Defendant Board than it does about the state of the law. It is typical of the gross manipulation of the Board's own illegality for its own advantage which has infested the entire case.

Similarly, Gerzof presents a judicial response to a different problem than the one presented here. In Gerzof a taxpayer brought action against town officials and the contractor alleging improper sale of a generator of greater cost than the one covered by the original bid.

The Supreme Court ruled that the generator should remain with the village, the village should have judgment against seller for the price and the Plaintiff could recover from the town officials, counsel fees, costs and disbursements. The Supreme Court Appellate Division modified to permit the seller to remove the generator if it repaid the price on posting bond and wiped out the question of costs. On cross-appeal, the Court of Appeals held that the seller had pursuaded the Trustees to re-write specifications for a larger generator at more money and therefore colluded to bring about the illegal purchase. It held that the seller should repay only the difference between the original bid price and the price for the more expensive generator.

That conclusion was reached after the Court had specifically found that the actions of the Board and the seller led to the conclusion "that there was such 'unlawful manipulation' in preparing and submitting the specifications as to render the contract illegal" (at 303;643). The Court further found that the contract was entered into "in defiance" of the bidding statute:

> "We conclude, nevertheless, though the patently illegal conduct of the Defendants entitles them to little consideration that the amount to be awarded should be less than (total restitution)." (emphasis added, at 305; 645)

The Court in Gerzof concluded with the observation:

> "Justice demands that even the burdens and penalties resulting from disregard of the law not be so proportionately heavy as to offend conscience."(at 306; 645).

Thus it appears that the spirit of Gerzof is appropriate to the present case and helpful to the Plaintiff Fabrizio. The letter of Gerzof, however, is totally inappropriate since there was joint culpability found in Gerzof and no culpability whatever found in the present case against the Plaintiff Fabrizio. Indeed, under the circumstances of the present case, Fabrizio was and is entitled to rely on the regularity of the acts done by the Board and did not have any obligation to ascertain if the Board, its architect and its attorney, had properly carried out their respective duties. Bank v. Board of Education 305 NY 119, 111 NE 2nd 238, 244 (195 3); Kennedy Electric Co., Inc. v. U.S. Postal Service 367 F. Supp. 828, 829 (1973); see also Sanger v. Bridgeport 124 Conn 183, 198 A 746.

Gerzof stands for the proposition that the Court should formulate an appropriate equitable remedy in each case of non compliance with a public bidding statute. In this case equity, in full compliance with the principle of Gerzof, requires that the innocent contractor not be penalized to the extent of unjustly enriching the public.

The Defendant Board's assertion that the law provides absolutely no relief for a contractor in a non staturory compliance situation is contradicted by the Board's own citations. The Board cites a note at 33 A.L.R. 3rd 1164 for that sweeping generality.

It neglected to mention that the annotation followed, and was meant to illuminate, Edwards v. Renton 67 Wash. 2nd 598; 409 P. 2nd 153;33 A.L.R. 3rd 1154. In Edwards, the Washington Supreme Court held that the contractor should be permitted to recover the value of traffic signals installed pursuant to an arrangement not in accordance with the requirements of applicable statutes. In fact, no bids for the design, manufacture, and installation of the signals were called for. The Court in Edwards stated that it was permitting recovery "with the understanding that the transaction involved is devoid of any bad faith, fraud or collusion..."(at 1162).

The annotation following Edwards is probably the latest and best compilation of cases in point. It contains numerous examples of instances in which innocent contractors were permitted recovery against municipalities notwithstanding a failure to comply with mandatory bidding statutes. It would serve no useful purpose to clutter this brief with a string of citations. It should suffice to note that they are sufficiently numerous to fill a column and a half of printed text at 33 A.L.R. 3rd 1181-1182.

Nor is New York left out. The annotation which the Defendant Board cites contains a reference to Brady v. New York 20 N.Y. 312 which asserted:

> "It is not necessary to deny that one who has bona fide performed labor, under a contract which is void from a failure to comply with the statutes, may maintain an action against the city of recover a quantum meruit, where the work has been accepted by the City, and has gone into use for public purposes." (33 A.L.R. 3rd 1178-1179).

That language from Brady apparently formed the basis for the decision in Abells v. Syracuse 40 N.Y.S. 233 in which a contractor was permitted to recover for extra work on a verbal order given in violation of the City Charter which provided that such work be let to the lowest bidder. The Court, affirming judgment in favor of the contractor, citing Brady, stated "that is the case at bar exactly, and that portion of the complaint covering this extra work is based upon a quantum meruit." (33 A.L.R. 1179) (N. 6).

Notwithstanding the rulings in Brady and Abells to the contrary, the Defendant Board categorically asserts at page 17 of its brief:

> "There is no exception to the rule, as set forth in the cases determined prior to Gerzof, and as reaffirmed by the Court of Appeals in Gerzof, that the public must receive at least what it contracted for, or what it would have contracted for had there been no illegality."

The Plaintiff Fabrizio will not be so dogmatic. There may well be some cases in which a totally innocent contractor has been victimized by a municipality with the approval of the courts. Plaintiff has not been able to find any. It is apparent that neither the Plaintiff nor the Defendant have been able to find any cases in which the victimization is ratified by the Courts in the name of equity.

POINT II

The decision below is inconsistent and contradictory to the extent that it permits the perpetrator of harm to benefit from the harm caused in the name of equity.

Judge Carter was faced with that he perceived as a very difficult task. He had, on the one hand, to balance the unquestioned innocence and moral correctness of the Plaintiff Fabrizio with the need to protect the integrity of a statute and important public policy on the other. Judge Carter made his dilemma explicit at Page 1060a of the decision below:

> "Plaintiff claims that extra costs and expense to it for which it seeks recovery is for work not called for in the contract but which it was required to do by the Board. While Plaintiff might be morally correct in assuming that it should be recompensed for additional work done at the behest of the defendant, the possibility of such work and additional payments were foreseen in the void contract and must fail as arising out of the contract. (emphasis added)

Whether the Court below would have ruled as it did if it had been aware of Brady and Abells is a matter of conjecture. It tried to resolve the apparent conflict between the demands of equity and justice on the one hand and public policy on the other thus:

> "Since the plaintiff is not being allowed to recover for any of these unpaid services, labor and materials, and the public has thereby been enriched to that extent, equity would seem best served by not altering the status quo. Hence, recovery by the Board of $171,000 is denied." (at page 1070a emphasis added)

The arbitrariness of that ruling is illuminated by the fact that the petulance of the Board and the happenstance of partial payment determined the outcome below. There is no reasoned application of any equitable principal which could serve as a guide to determining what the recovery of the Plaintiff should be. Apparently if another $171,000 had been paid to the Plaintiff Fabrizio that would have been affirmed by the Court below as would a payment of $171,000. less.

While it is true that equitable considerations cannot be weighed or measured with precision it does not follow that they are utterly beyond the perameters of reason and logic. If, as the court below found, equity demands that the Plaintiff contractor be protected from the harshness of Jarret & Gerzof it would seem to follow that the protection would extend at least to the point at which the public has been demonstrably enriched. In this case $708,526,15 (1070a).

POINT III

Public policy and the integrity of the statute may be protected without penalizing the Plaintiff contractor.

The premise of equity, so fundamental as to require no citation, is that he who has acted in violation of fundamental principle of fairness shall not benefit from his wrong doing. This is sometimes known as the "clean hands" doctrine. As has been noted above, the hands of the Board, whether by design or accident, are filthy. Some of it may have rubbed off on the Plaintiff contractor. But that could hardly justify the Court in compounding the affront to equity.

It seems simple, fair and just to let those responsible for the violation of the statute bear the cost of that violation.

In this case, the members of the Board cajoled the Plaintiff Fabrizio into letting his bid stand, after he demonstrated an arithmetic error and after the prior bidder had been permitted to withdraw under similar circumstances. They did so because, apparently, the Plaintiff's bid, even with the $171,000 added, was substantially less than the next highest bidder. The procedure urged by the Board on the Plaintiff Fabrizio who sought to withdraw his bid was ratified and confirmed by the whole Board, its architect and its attorney. The Board must have suspected some illegality from the outset. Why else would the instruction to remove the letter from the architect to the Board's attorney re. the change order from the file be issued? (89a).

If it could be demonstrated that the attorney, the architect and the Board members had conspired to trick the Plaintiff into supplying labor and material to build the school while always intending to deny payment because of the illegality which they conspired to bring about, it would be unthinkable that only the Plaintiff would be penalized under those circumstances while the town officials, the town attorney and the architect should escape any responsibility. Yet, how different is that from the present situation?

It may be true that there might not have been a deliberate conspiracy to manipulate illegality in order to steal from the Plaintiff, but the net effect was the same.

The distinction between being hit by a stray bullet, as opposed to being aimed at, is metaphysical not legal. The pattern of manipulation on the part of the Board arising from the facts found by the Court below culminating in the Board's refusal to accept a solution backed by Aetna indicates that the Board's conduct became willful and malicious very early on if it was not so at the outset.

Under these circumstances, what better protection could there be for the public, what better vindication for the policy, what better support for the integrity of the statute than to make the Board members, the architect and the town attorney assume the greater burden of reimbursing the town for whatever loss, if any, failure to abide by the statute might entail? That would not only be equity but justice as well.

POINT IV

The Board had a duty to mitigate any possible damages, which duty if failed to perform.

There is nothing in either law or logic which permits public officials to aggravate or even to fail to mitigate any claimed damages to the public resulting from violation of bidding statutes on the chance that recovery might ultimately be had from the original contractor or its surety. Yet that is precisely what was done in this case.

The Board's actions after the final and wrongful termination of the Fabrizio contract is consistent with the complete bad faith exercised throughout the entire relationship. Aetna attempted to have the entire project completed without additional cost to the Board, subject only to a reservation of rights of all the parties to be determined after the completion of the project.

(Max E. Greenberg, 870-874a) The Board's attorney during the cross-examination of the witness (Max E. Greenberg, (875a-885a) conceded such a proposal by Aetna and for some unknown reason went out and got another contrator.

Thus, the Board rather than mitigating the loss embarked on a course of needless expense when Aetna offered to complete with its financial resources.

The potential claim of public loss to the extent of $171,000 was aggravated and expanded to $603,925 by the Board's own calculation (page 23 of its brief) because of its refusal to limit the public's exposure to the initial $171,000 in dispute. And there can be no question that aspect of the Board's conduct was willful and malicious.

It also follows that all costs of completion, extras and additional bond payments incurred by the Board in the face of Fabrizio's and Aetna's offer to complete are no direct consequence of the illegal contract and are not their responsibility.

CONCLUSION

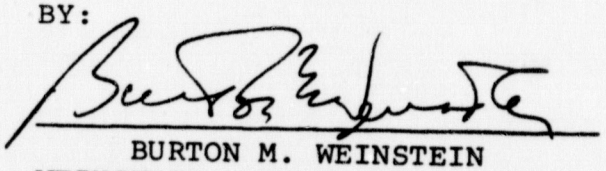
THE COURT BELOW ERRED IN DISMISSING THE COUNTER-CLAIMS OF THE PLAINTIFF FABRIZIO AND IN FINDING THAT IT SHOULD BEAR LOSSES OF WHICH IT IS INNOCENT. THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO HAVE THE COURT FIND THE DOLLAR VALUE OF MATERIAL AND SERVICES SUPPLIED BY FABRIZIO FROM WHICH THE PUBLIC DERIVED A BENEFIT AND TO AWARD A PAYMENT OF SAID SUMS TO FABRIZIO.

Dated: Bridgeport, Connecticut
This 28th day of August, 1974

Respectfully submitted

THE PLAINTIFF APPELLEE
FABRIZIO & MARTIN INC.

BY:



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